UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA

In re

LAND VENTURES FOR 2, LLC

Plaintiff,

v. Bankruptcy Court Misc. No. 13-302
Civil Action No. 2:12cv240-SRW

MICHAEL FRITZ, SR., et. al.,

Defendants.

REPORT AND RECOMMENDATION

This Civil Action has been referred to the undersigned by the District Court pursuant to its Order of February 14, 2013.[1] It is before the Court on cross motions for summary judgment. (Docs. 31-37, 40-44). For the reasons set out below, it is recommended that the District Court grant the motion for summary judgment filed by Defendants Michael A. Fritz, Sr. and Fritz, Hughes & Hill, LLC, deny the cross motion for summary judgment filed by Plaintiff Land Ventures for 2, LLC, and dismiss this civil action with prejudice.

[1] This civil action is styled Land Ventures for 2, LLC v. Michael A. Fritz, Sr., and Fritz, Hughes & Hill, LLC, Civil Action No. 2:12-CV-240. When it was referred to the undersigned, it was assigned Misc. No. 13-302, in the Bankruptcy Court.

I. PROPOSED FINDINGS OF FACT

A. History of This Civil Action

Plaintiff Land Ventures for 2, LLC, filed suit in the District Court on March 15, 2012, initiating Case No. 12-CV-240-SRW. Defendants Fritz and Fritz, Hughes & Hill, LLC,[2] are a lawyer and a law firm respectively, which represented Land Ventures in a bankruptcy case. Land Ventures claims that Fritz and his firm are guilty of malpractice in his representation of it in a bankruptcy case which was filed in the Middle District of Alabama. Land Ventures is a Florida limited liability company with its principal place of business in Santa Rosa Beach, Florida, Fritz is an Alabama resident and Fritz, Hughes & Hill, LLC, is an Alabama limited liability company, which practices law in Montgomery, Alabama. The amount in suit exceeds $75,000. The District Court has jurisdiction pursuant to 28 U.S.C. § 1332 (diversity of citizenship).

The District Court referred this civil action to the undersigned by its order of February 14, 2013. To permit the Bankruptcy Clerk to maintain the file of this civil action, the Bankruptcy Clerk opened Miscellaneous Proceeding 13-302 and it was directed that all pleadings and papers filed in the future be filed in the Bankruptcy Court under this Misc. Pro. number. Discovery has been completed and the parties have filed cross motions for summary judgment.[3]

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[2] While there are two separate defendants, Michael A. Fritz, Sr., and Fritz, Hughes & Hill, LLC, the undersigned will refer to both Defendants collectively as Fritz.

[3] The parties jointly requested that discovery be reopened in the event the Court's ruling on the motions is not dispositive. As the undersigned has recommended that the District Court

B. History of the Bankruptcy Proceedings

On March 16, 2010, Fritz filed a petition in bankruptcy in the United States Bankruptcy Court for the Middle District of Alabama, pursuant to Chapter 11 of the Bankruptcy Code, on behalf of Land Ventures, initiating Case No. 10-30651. Under the Court's case assignment procedures, the Chapter 11 case was assigned to the undersigned. At the time the petition was filed, Farm Credit of Northwest Florida, ACA–Land Ventures' largest creditor–had begun foreclosure proceedings against two parcels of real property owned by Land Ventures. The two parcels in question will be called the Luverne property, consisting of 171 acres of unimproved real property south of Luverne, Alabama, and the Holmes County property, which is 107 acres of unimproved real property in Holmes County, Florida. Land Ventures was then in the business of buying, selling and leasing real property. At that time it filed bankruptcy, Land Ventures owned eight pieces of real property, which it valued in its schedules as follows:

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grant Fritz's motion and dismiss the civil action with prejudice, further discovery will be moot. In the event the District Court decides to do something other follow the undersigned's recommendation, leaving a live case, the undersigned promised the parties that he would consider allowing further discovery, depending upon what is in issue. In the event the District Court was to conduct further proceedings itself, the undersigned respectfully requests that it honor the undersigned's promise and consider the parties' request to conduct further discovery.

Property	Scheduled Value[4]
1. 185 Garrett Dr., Daleville, AL	800,000
2. 1695 Scott Road, (Holmes Co.) Westville, FL	357,000
3. Highway 331 South, Luverne, AL	770,000
4. 2254 Beach Dr, Gulfport, MS	185,000
5. 34 Herons Watch Way, Santa Rosa, FL	127,000
6. 130 Elliott Dr., Bonnieville, KY	289,000
7. 5847 Coy Burgess Loop Rd., Defuniak Springs, FL	127,000
8. Highway 331 North Rutledge, AL	350,000
Total stated value	$3,005,000

On June 3, 2010, Farm Credit of Northwest Florida, ACA, filed a motion for relief from the automatic stay in the Bankruptcy Court, seeking leave to proceed with its foreclosure proceedings. (Case No. 10-30651, Doc. 50). Land Ventures owed Farm Credit $743,000 and had not made a payment on the indebtedness in over a year. The indebtedness was secured by

[4] When a debtor files for bankruptcy, it is required to file Schedules listing all of its assets and liabilities. See, 11 U.S.C. § 521; Rule 1007, Fed. R. Bankr. P. The Schedules must be signed by an authorized representative of the debtor corporation under the penalties of perjury. Rule 1008, Fed. R. Bankr. P. These values are taken from Schedule A, which lists all real property owned by Land Ventures, and which was signed by Pittman under the penalties of perjury. (10-30651, Doc. 1) Scheduled amounts are a useful starting point, as it is the debtor's view of what the property is worth; however, the Bankruptcy Court does not accept the debtor's opinion as to the value of its property as conclusive.

mortgages on the the Holmes County, Florida, and Luverne, Alabama properties. Farm Credit had accelerated the indebtedness and begun foreclosure proceedings prior to the bankruptcy filing, which were stayed when Land Ventures filed bankruptcy.[5] When Farm Credit filed its motion for relief from the automatic stay, it had appraisals of the property indicating values of $556,400 for Luverne and $357,000 for Holmes County, for a total of $913,400. The appraisals were a year old at the time the motion for relief from the automatic stay was filed. Farm Credit alleged in its motion that relief from the automatic stay should be granted because it lacked adequate protection for its interest in the two properties.

Land Ventures opposed Farm Credit's motion, contending that there was sufficient value in the property so as to provide an equity cushion to protect Farm Credit's interest.[6] Land Ventures did not dispute Farm Credit's claim that payment had not been made in over a year, nor did it offer to make periodic payments to Farm Credit. On July 16, 2010, Farm Credit supplemented its motion, providing current appraisals which valued the Holmes County property at $256,000 and the Luverne property at $515,000, for a total value of $771,000. (10-30651, Doc. 78). According to these latest appraisals, the value of the two properties combined had

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[5] The filing of a petition in bankruptcy gives rise to a stay which stops almost all collection activity. 11 U.S.C. § 362(a). Because the debtor need not take any action, other than filing a petition in bankruptcy, it is referred to as the "automatic stay." The bankruptcy court may grant relief from the automatic stay upon a showing of cause, including the debtor's failure to provide "adequate protection" to the creditor for its interest in the debtor's property. 11 U.S.C. § 362(d).

[6] Fritz did not file a written response to Farm Credit's motion, nor did he make a written offer of adequate protection. Farm Credit attached a copy of a letter to it from Fritz dated March 22, 2010, where he took the position that Farm Credit was adequately protected by an equity cushion. (10-30651, Doc. 50, Ex. 7). Fritz made an argument at the August 26, 2010 hearing which was consistent with his March 22 letter.

decreased by $142,000 in little more than a year. As no payments had been made on the debt, as of July 13, 2010, it had grown to $769,894.92.

On August 26, 2010, the Bankruptcy Court heard evidence on Farm Credit's motion. At that hearing, Farm Credit offered evidence of the amount of its debt and its most recent appraisals. The amount owed by Land Ventures had grown to $769,894.92 and the appraised value of the two parcels of real estate had dropped to $771,000, leaving virtually no equity, certainly not enough equity to protect Farm Credit for an indefinite period of time into the future. The financial reports on file with the Bankruptcy Court showed that Land Ventures did not have the ability to make periodic payments to Farm Credit. Specifically, the monthly reports filed by Land Ventures with the Bankruptcy Court are summarized as follows:

Period	Reported Net Income[7]
March 2010	(813.87)
April 2010	2,734.24
May 2010	264.25
June 2010	(185.83)
July 2010	1,272.23
Aug. 2010	1,610.27
Sept. 2010	(4,632.51)
Oct. 2010	33,080.44[8]

[7] These figures are taken from monthly reports filed with the Bankruptcy Court by Land Ventures. In other words, these are Land Venture's unaudited numbers. (Case No. 10-30651). These are net income figures on a cash basis where Land Ventures has not made the monthly payments due Farm Credit, in the amount of $4,110.38. Bracketed figures are negative.

[8] The $33,080.44 cash profit for the month of October 2010, includes $9,867.59 for the proceeds of the sale of the Bonnieville, Kentucky property and $19,384.47 proceeds from the sale of two acres of the Rutledge, Alabama property. While these proceeds were realized by Land Ventures they are nonrecurring items which will not be repeated in future periods. If the sale proceeds are backed out of these figures, the net income would have been $3,828.38. Again, it should be recalled that Land Ventures was not paying the $4,110.38 monthly payment called

Nov. 2010	(10,191.41)
Dec. 2010	1,104.11

Land Ventures disputed Farm Credit's contentions as to the value of the Luverne and Holmes County properties. After hearing the evidence, the Bankruptcy Court found that the value of the properties were as set out in Farm Credit's property appraisals. Because Land Ventures lacked the ability to make periodic payments to Farm Credit and because there was no equity in the property, the Bankruptcy Court found that Land Ventures could not provide adequate protection to Farm Credit for its interest in the property and concluded that sufficient cause had been shown to grant Farm Credit relief from the automatic stay. At the conclusion of the August 26, 2010 hearing, the Bankruptcy Court granted Farm Credit's motion for relief from the automatic stay. (10-30651, Doc. 108). The significance of this is that Farm Credit was then free to proceed with its foreclosure proceedings against the two properties.

On September 3, 2010, Land Ventures filed a timely notice of appeal. (10-30651, Doc. 113). On September 15, 2010, Fritz filed a Motion to Stay Pending Appeal. (10-39651, Doc. 125). The Bankruptcy Court heard Fritz's motion for a stay on September 21, 2010, where the following was colloquy took place.

> THE COURT: . . . I will tell you what I am going to do. We have got a couple other matters. You can talk with your client. I am not going to give you – I am not going to grant your motion for stay unless you agree to encumber the other properties to protect the bank. You understand I can tell the risk you are taking if you do that. So, you know, you can talk with your client. But if you don't

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for the Note as modified March 22, 2008.

do that, then I will deny your motion and you can take your chances with the District Court.

MR. FRITZ: Thank you, Your Honor.

(Whereupon the Bankruptcy Court heard matters in unrelated cases from 11:06 a.m. until 11:27 a.m.)

THE COURT: Mr. Fritz.

MR. FRITZ: Yes, you Honor. After conferring with my client, we are not going to make an offer to put up any more collateral for this.

THE COURT: All right. Well, then, I am going to take that – well, I am going to deny your motion, then because I think the property is about liened up. We have no, sort of, light at the end of the tunnel. I mean, your plan seems to be to hang onto the property indefinitely and just let the bank, I guess, sort of hang out there indefinitely, and I am not willing to do that. So I don't think – I didn't think the bank was adequately protected when I ruled in August. I offered you the opportunity to encumber other property. I mean, it is a risk but what it does is it puts the risk on your client where I think it ought to be.

My problem with this from the start has been you are wanting to put the bank in a situation where they are bearing the risk and, in the event you sell the property for a lot of money, your client gets the profit. I don't think that's the way bankruptcy is supposed to work.

* * *

THE COURT: All right. Well, for those reasons, I will deny the motion.

(10-30651, Doc. 141, pp. 16-17). The Bankruptcy Court denied Land Ventures' motion by its order dated September 23, 2010. (10-30651, Doc. 134).

Fritz them moved the District Court to reconsider the September 23 order denying his motion to stay. The District Court denied Land Ventures' motion to reconsider, which left Farm Credit free to proceed with foreclosure proceedings. Land Ventures v. Farm Credit, Civil No. 10-CV-839; 2010 WL 4176121 (M.D. Ala. Oct. 18, 2010). As Farm Credit's foreclosure proceeding was no longer stayed, it could proceed with the forced sale of the Luverne, Alabama and Holmes County, Florida properties, thereby defeating Land Ventures' attempt to continue to hold the properties for sale. After losing its motion to reconsider the denial of the stay by the Bankruptcy Court, Land Ventures withdrew its appeal.

The Bankruptcy Court converted Land Ventures Chapter 11 case to a case under Chapter 7 on March 29, 2011. (10-30651, Doc. 180). Upon conversion to Chapter 7, a Chapter 7 Trustee is appointed and the debtor is no longer a debtor-in-possession, meaning that Trustee Susan DePaola rather than Todd Pittman was in control of the assets of Land Ventures. DePaola liquidated the assets of Land Ventures, receiving total proceeds of $757,468.98. Todd Pittman was paid $151,280.86 out of the bankrupt estate. (10-30651, Doc. 451). Moreover, Farm Credit was paid $340,511.19, in addition to the proceeds it received from the liquidation of its collateral. As Pittman had personally guaranteed Land Ventures' indebtedness to Farm Credit, he reaped a benefit not only to the extent that he actually received payment from the Trustee, but also in that he was relieved from his indebtedness to Farm Credit.

C. The Aftermath

Farm Credit Bank foreclosed its mortgages on both the Holmes County and Luverne properties. The Luverne property was sold in 2012 for $300,000, having held it on the market for almost two years, in addition to the year or two that Land Ventures had attempted to sell it prior to filing bankruptcy. (Abbey Todd Depo., p. 112). The Holmes County property was sold for $200,000. (Abbey Todd Depo., pp. 114). Ms. Todd further testified that Pittman's wife wrote Farm Credit making inquiry about redeeming the property, but neither Pittman nor his wife ever came forward with the money necessary to redeem.[9] (Todd Dep., p. 118).

II. PROPOSED CONCLUSIONS OF LAW

A. Jurisdiction

The District Court has subject matter jurisdiction over this civil action pursuant to 28 U.S.C. § 1332. The Plaintiff and the Defendants are citizens of different states and the amount in controversy exceeds $75,000. The Defendants do not dispute the District Court's jurisdiction to hear this matter.

[9] As a guarantor of Land Ventures' debt to Farm Credit, Pittman had a right of redemption under Alabama law. Ala. Code § 6-5-248.

B. Summary Judgment Standard

This civil action is before the District Court on cross motions for summary judgment. For the reasons set forth below, it is recommended that The Defendants' motion for summary judgment be granted and that the Plaintiff's motion for summary judgment be denied.

Motions for summary judgment are governed by the provisions of Rule 56, Fed. R. Civ. P.

> Rule 56(c) provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Where, as here, the non-moving party bears the burden of proof on an issue at trial, the moving party, in order to prevail, must do one of two things: show that the non-moving party has no evidence to support its case, or present "affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial." United States v. Four Parcels of Real Property, 941 F.2d 1428, 1437–38 (11th Cir.1991) (en banc). Once the moving party has met its initial burden by negating an essential element of the non-moving party's case, the burden on summary judgment shifts to the non-moving party to show the existence of a genuine issue of material fact. Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1116 (11th Cir.1993). For issues on which the non-moving party will bear the burden of proof at trial, the non-moving party must either point to evidence in the record or present additional evidence "sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency." Id. at 1116–17.

Hammer v. Slater, 20 F.3d 1137, 1141 (11th Cir. 1994). In this case the nonmoving party–Land Ventures–would have the burden of proof at trial. The moving party–Fritz–by submitting depositions and other evidentiary material has met his initial burden by negating two elements of

the Land Ventures' case.[10] First, Fritz maintains that he did not breach the applicable standard of care and contends that Land Ventures has failed on that element because their expert–Brett Weiss–is not qualified to give testimony. Second, in the alternative, Fritz contends that even if there was a breach of the duty of care, Land Ventures fails on the element that the breach was the proximate cause of any damages. As both evidence of the standard to care and the proximate cause of damages are both essential elements of Land Ventures' claim, the failure of either is fatal to its case.

C. The Elements of a Lawyer Malpractice Case

The exclusive remedy for a client who wants to sue his lawyer for malpractice in Alabama is under the Alabama Legal Services Liability Act. Ala. Code § 6-5-573; San Francisco Residence Club, Inc. v. Baswell-Guthrie, 897 F.Supp. 2d 1122, 1172 (N.D. Ala. 2012); Fred's Stores of Tennessee, Inc. v. Patel, 2006 WL 3512994 (M.D. Ala. Oct. 20, 2006); Borden v. Clement, 261 B.R. 275, 282 (N.D. Ala. 2001); Roberts v. Lanier, 72 So.3d 1174, 1180-81 (Ala. 2011); Sessions v. Espy, 854 So.2d 515, 522 (Ala. 2002).

The elements of an action for legal malpractice in Alabama are as follows:

1. A duty of care.

[10] Several thousand pages of submissions has been made. For purposes of considering whether Fritz has met his initial burden–showing either that: (1) Land Ventures has failed to prove that he did not meet the standard of care; (2) it has failed to prove that it suffered damages; or (3) that even if it shows both a breach of the duty of care and damages, it failed to show the necessary element of causation. Fritz met his burden by submitting the deposition of Collier Espy. (Doc.31, Ex. 2). Espy summarizes his conclusions at pages 143-47 of his deposition. In addition, Espy's expert report also sets out his conclusions. (Doc. 22).

2. A breach of the duty.

3. Injury.

4. The breach must be the proximate cause of the injury.

Robinson v. Benton, 842 So.2d 631, 634 (Ala. 2002); Independent Stave Co. v. Bell, Richardson and Sparkman, P.A., 678 So.2d 770, 772 (Ala. 1996); Moseley v. Lewis and Brackin, 533 So.2d 513, 515 (Ala. 1988). A claim for legal malpractice requires a showing that in the absence of the alleged negligence the outcome of the case would have been different. Independent Stave Co., 678 So.2d 772; Moseley, 533 So.2d 515; Hall v. Thomas, 456 So.2d 67 (1984).

The standard of care is prescribed by Alabama statute:

> In any action for injury or damages or wrongful death, whether in contract or in tort, against a legal service provider, the plaintiff shall have the burden of proving that the legal service provider breached the applicable standard of care. The applicable standard of care shall be as follows:
>
> (1) The applicable standard of care against the defendant legal service provider shall be such reasonable care and skill and diligence as other similarly situated legal service providers in the same general line of practice in the same general area ordinarily have and exercise in a like case.
>
> (2) However, if the defendant publishes the fact that he or she is certified as a specialist in an area of the law or if the defendant legal service provider solicits business by publicly advertising as a specialist in any area of the law, the standard of care applicable to such legal service provider in a claim for damages resulting from the practice of such a specialty shall be such reasonable care, skill, and diligence as other legal service providers practicing as specialist in the same area of the law ordinarily have and exercise in a like case.
>
> (3) Nothing in this article shall be deemed to allow either the solicitation of business by or advertising by a legal services provider in violation of any rule of the Alabama Supreme Court.

Ala. Code § 6-5-580.

D. The Claim of Land Ventures Fails for Three Reasons: (1) There is no evidence that Fritz has breached the standard of care; (2) There is no evidence that Land Ventures has suffered any damages; (3) There is no causal connection between any arguable breach and any damages

1. Land Ventures has failed to prove that Fritz violated the standard of care because his expert, a Maryland lawyer, is not competent to testify as to the standard of care owed by an Alabama lawyer

A claim against an attorney under the Alabama Legal Services Liability Act must be supported by the testimony of a lawyer, competent to testify, that there has been a breach of the standard of care. Baswell-Guthrie, 897 F.Supp. 2d. 1172; Wachovia Bank, NA v. Jones, Morrison & Womack, P.C., 42 So.3d 667, 679 (Ala. 2009); Tonsmeire v. AmSouth Bank, 659 So.2d 601, 605 (Ala. 1995). Fritz has offered the testimony of Collier Espy, a bankruptcy specialist who practices law in Dothan, Alabama, who practices frequently in the Middle District of Alabama Bankruptcy Court. Espy has given his opinion, that Fritz did not breach the standard of care he owed to his client Land Ventures. (Doc. 22–Espy Expert Report; Doc. 31–Espy Deposition). As Fritz has submitted evidence showing that he has not breached the standard of care, the burden shifts to the nonmoving party. "When the defendant in a legal-malpractice case has offered 'evidence that makes a *prima facie* showing that the defendant did not act negligently, then, in order to defeat the summary judgment motion, the plaintiff must rebut the

defendant's *prima facie* showing with expert testimony indicating that the defendant lawyer did act negligently.'" Baswell-Guthrie, 897 F.Supp. 2d 1194-95 (citing McDowell v. Buford, 646 So.2d 1327, 1328 (Ala. 1994)).

When a plaintiff bringing a malpractice case fails to provide testimony of a lawyer in support, the claim necessarily fails. Id. In this case, Fritz contends that the claim of Land Ventures fails because the only evidence it provides in support of its contention that Fritz breached the standard of care is the testimony of Brett Weiss, a lawyer from Maryland. Fritz argues that because Weiss is not an Alabama attorney and that he has not practiced law in Alabama, he is not qualified and for that reason, his testimony should not be considered. Land Ventures argues that the applicable standard of care is nationwide and that Weiss is qualified.

In their respective arguments for the applicable geographical limitation on the standard for reasonable care, both parties cite Baswell-Guthrie. In that case, attorneys were hired to represent parties to a complicated real estate transaction. It was intended that the transaction qualify as a "like kind" exchange within the meaning of 26 U.S.C. § 1031. If a transaction meets the requirements of § 1031, no taxes are incurred. On the other hand, if the transaction does not qualify, the transaction will be a taxable transaction. It was alleged in Baswell-Guthrie, that as a result of the closing attorney's negligence, the transaction would not qualify for treatment as a "like kind exchange," resulting in adverse tax consequences. The transaction in question involved property in Huntsville, Alabama and was closed in Huntsville. However, the plaintiff in Baswell-Guthrie, offered the testimony of a Tennessee lawyer to show that an Alabama lawyer breached her duty of care, contending that Federal tax laws are uniform nationwide and that an out of state lawyer should be permitted to testify to the standard of case to be used by a

lawyer who is closing a real estate transaction which intended to qualify as a like kind exchange. After considering the Tennessee lawyer's qualifications, the District Court concluded that he did not qualify.

> Any witness who proposes to provide expert opinion testimony in connection with such a claim must be competent to testify about that degree of reasonable care, skill, and diligence that similarly situated attorneys providing legal services in the same general line of practice in the same general locality or area ordinarily have and exercise in a similar case. Regardless of the nature and extent of Crockett's experience with like-kind exchanges and real estate transactions in general, he does not possess the requisite experience or competence to testify on the standard of care expected of real estate attorneys closing property acquisitions in Huntsville, Alabama.

Baswell-Guthrie, 897 F.Supp. 2d 1193.

The Court in Baswell-Guthrie further looked to the "Notes on Use" to the Alabama Pattern Jury Instructions.

> Unlike the standard of care for physicians under the Alabama Medical Liability Act ..., the definition of "same general locality or area" has not been broadened to encompass a national legal community or even a statewide legal community standard. Attorneys are subject to any number of local rules (written and unwritten) and procedures. The outer boundaries of the defendant-attorney's "same general locality or area" may vary from case to case, according to the facts of the particular case.

Baswell-Guthrie, at 1192 (citing 1 Alabama Pattern Jury Instructions–Civil § 25A.01, at 318-29 (2d ed. 1993)). Based upon the guidance provided by Baswell-Guthrie and Ala. Code § 6-5-272, the Court concludes that the pertinent geographical boundary when considering the duty of care owed the client, is a statewide area. In other words, the Court will consider the level of

reasonable care and skill and diligence as other similarly situated legal service providers in the State of Alabama. As Mr. Weiss is not admitted the Alabama bar, has not practiced law in Alabama, claims to have no knowledge of Alabama law, indeed has never been to Alabama, the undersigned concludes that Mr. Weiss is not qualified to give an opinion as to the standard of care owed by an Alabama lawyer who practices bankruptcy law to a client in Alabama.

Land Ventures argues that because the case involves Federal bankruptcy law, that the applicable standard should be a nationwide rather than a statewide standard. See, 11 U.S.C. § 101, et. seq.; see also, U.S. Const. Art I, § 8, cl. 4 (giving Congress the authority to establish uniform law on the subject of bankruptcy throughout the United States). If the pertinent standard was nationwide, then Weiss would probably qualify as an expert.[11] Therefore, the admissibility of his testimony turns on the appropriate geographic limitation that must be considered when determining whether a lawyer may give expert testimony as to the standard of care. Land Ventures' argument for a nationwide standard or care fails for three reasons: (1) the practice of bankruptcy law involves the interplay of state and Federal law; (2) the art of practicing law necessarily involves the interplay of a lawyer with his client, with opposing parties and with a court, all of which are inherently local in nature; and (3) the imposition of a nationwide standard of care in an action under the Alabama Legal Service Provider Liability Act would undermine the purposes of the Act.

[11] Fritz raises other objections to Weiss' qualifications in addition to his lack of knowledge of Alabama law or the practices Alabama lawyers. As the Court has concluded that the applicable standard of care is state wide rather than nation wide basis, Weiss is not qualified for this reason alone. If standard of care were determined to be nation wide, then the remainder of Fritz's objections to Weiss' qualifications would have to be considered before his conclusion that Fritz breached the standard of care could be accepted.

First, while bankruptcy laws are uniform throughout the United States, the work of a bankruptcy lawyer necessarily involves the interplay of Federal bankruptcy law with state law. Bankruptcy law is a Federal overlay, over the top of state property, contract, tort and any number of other state laws. Two examples will illustrate the principle. Section 541 of the Bankruptcy Code provides, in general terms, that all of the property the debtor owned at the time he files bankruptcy becomes property of the bankruptcy estate. However, the Bankruptcy code does not define what those property interests are or what they mean. If one wants to know what a debtor's property rights are, one must look to state law, in this case primarily Alabama law, to know what property interests a debtor may have.[12] A second example are the rules governing claims in bankruptcy proceedings. In general, the Bankruptcy Code defines a claim as a right to payment. 11 U.S.C. § 101(5). Yet the Bankruptcy Code does not further define this "right to payment." Instead, one must look to state law as well.[13] The vast majority of claims in bankruptcy proceedings are defined by state contract, property and tort law. Thus, two of the most important questions in a bankruptcy proceeding, what does the debtor own, and what does he owe, are determined by state law. A nationwide standard would gloss over the vast majority of issues facing a bankruptcy lawyer.

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[12] To complicate matters in this case, Land Ventures is a Florida corporation, which owned real property in Florida, Alabama, Mississippi and Kentucky. As Land Ventures's "crown jewel" was the Luverne, Alabama property, Alabama law would govern with respect to that property. Moreover, the bankruptcy case was filed in the Middle District of Alabama.

[13] To be sure, while some claims are defined by Federal law, the most common are Federal tax claims, which are necessarily creatures of Federal law. While there are some liabilities which are solely creatures of Federal law, the overwhelming majority of debts facing debtors who file bankruptcy, and the lawyers who represent them, are claims arising under state law.

Second, the art of practicing law necessarily involves the interplay between a lawyer, his client, opposing parties and the court. In its most basic form, the practice of law is the act of giving advice to a client and if necessary representing him in court. The environment in which this takes place necessarily varies widely from one place to another. The District Court in Baswell-Guthrie, concluded that "regardless of the nature and extent of Crockett's [the Tennessee lawyer] experience with like-kind exchanges and real estate transactions in general, he does not possess the requisite experience or competence to testify on the standard of care expected of real estate attorneys closing property acquisitions in Huntsville, Alabama." Baswell-Guthrie, 897 F. Supp. 2d. 1193. The same is true here. Land Venture's expert Weiss has no knowledge of Alabama law, no experience practicing law in Alabama and has no experience with bankruptcy courts in Alabama. To be sure Weiss has knowledge of Federal bankruptcy law, like the Tennessee attorney in Baswell-Guthrie had knowledge of Federal tax law. Yet, Weiss's testimony should be stricken here for the same reason that the District Court in Baswell-Guthrie would not accept the testimony of a Tennessee lawyer.

Third, the imposition of a nationwide standard would undermine Alabama Law. The standard of care contained in the Alabama Legal Services Provider Liability Act includes a reference to "the same general area." Ala. Code 6-5-580(1). The reference to the same general area necessarily implies a geographic area smaller than the United States. While Land Ventures argues for the imposition of a nationwide standard, none of the cases it has cited in its briefs stands for the proposition that a nationwide standard should apply. In addition, the Court has conducted independent research of his own and not found any cases which imposed a nationwide standard. In a case involving attorney malpractice in a Chapter 11 bankruptcy proceeding in

New York, a Bankruptcy Court in the Eastern District of New York stated as follows: "an attorney is negligent if he 'failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by an ordinary member of the legal community.'" McCord v. Jaspan Schlesinger Hoffman, LLP (In re Monahan Ford Corp. Of Flushing), 390 B.R. 493, 500 (Bankr. E.D.N.Y. 2008).

Three additional arguments, relating to the necessity of expert testimony in an attorney malpractice case, made by Land Ventures should be addressed, which are: (1) there are only three lawyers who practice Chapter 11 law in the Middle District of Alabama, therefore the standard must be nationwide; (2) Collier's Espy's legal opinions are legally incorrect because they rely on information obtained from Fritz; and (3) Fritz was negligent per se, and for that reason expert testimony is not necessary. These three arguments will be addressed in order.

First, Land Ventures argues that because there are only three lawyers who represent debtors in Chapter 11 cases in the Middle District of Alabama, the imposition of a districtwide standard would make the prosecution of a malpractice case impossible. The three lawyers Land Ventures identified were Fritz, the Defendant here, Collier Espy, Fritz's expert, and the Montgomery firm of Memory and Day. Fritz and Espy are obviously not available and Memory and Day turned down Land Ventures request to provide expert testimony, leaving no one else in the Middle District. This argument is wrong for two reasons. First, there are several other lawyers in the Middle District who handle Chapter 11 bankruptcy cases. Land Ventures claim is without merit for that reason alone.[14] Second, and more important, there are any number of

[14] The undersigned has served as a Bankruptcy Judge in the Middle District for fifteen years and before that practiced law in Mobile, Alabama for ten years, much of which involved Chapter 11 bankruptcy cases. Without naming names, there are at least two additional lawyers

lawyers in Mobile and Birmingham who practice in the Middle District and have competently represented Chapter 11 debtors in this Court. Land Ventures' argument that a nationwide standard of care must be applied so as not to preclude all attorney malpractice cases against Chapter 11 bankruptcy lawyers in the Middle District of Alabama is factually wrong. The pertinent standard of care would be statewide.

Second, Land Ventures makes the argument that the Court should not consider Espy's testimony because it is legally incorrect. (Doc. 30–Land Ventures Motion to Exclude Espy's Testimony). While it is a correct statement of the law that an expert opinion that is contrary to law is inadmissible, it does not follow that this principle would result in the exclusion of Espy's testimony here. Loeffel Steel Products, Inc., v. Delta Brands, Inc., 387 F.Supp. 2d 794, 806 (N.D. Ill. 2005). Land Ventures argues that because Espy's testimony is based, in part, on the truth of what Fritz told him about the case, it is legally in error.

This second argument of Land Ventures is far too sweeping. To be sure, Land Ventures is correct in that it may question any assumptions upon which any expert bases his opinion. The fact that Espy relied in part upon information obtained from Fritz does not make his opinion per se inadmissible. Rather, Espy's conclusions, like the conclusions of any expert witness, must be based upon a reliable foundation. Rule 702, Fed. Rules of Evidence; Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590, 113 S.Ct. 2786, 2795 (1993); United States v. Frazier, 387 F.3d 1244, 1261-62 (11th Cir. 2004). Espy has adequately explained the basis for his opinion. The burden then shifts to Land Ventures to show how it is in some way deficient. That

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in the Middle District who are competent to practice law in cases under Chapter 11. If one extends the search to include Birmingham, Mobile and Huntsville, there are at least a dozen more.

some of the information relied upon by Espy is received from Fritz is not sufficient by itself to result in the preclusion of its evidence. The touchstone is not the source of the expert's information, but its reliability. Daubert, 509 U.S. at 594-95. The Court has examined Espy's expert report (Doc. 22) and finds that he is qualified, that his opinions are based on valid evidence and that his expert report would be admissible if it was offered at an evidentiary hearing. Land Ventures objection to the Court's consideration of Espy's expert opinion is overruled.

Land Venture's third argument, that expert testimony to the effect that Fritz failed to meet the standard of case is not necessary because Fritz's incompetence is self-evident, is without merit. Land Ventures contends that Fritz was negligent in that he failed to timely file a plan of reorganization. While it is true that Fritz did not file a plan of reorganization, timely or otherwise, this failure is not, by itself, evidence of a failure on the part of Fritz to use due care. The failure to file a plan is not analogous to the case where a surgeon leaves a sponge in a patient or a lawyer neglects to file suit until the statute of limitations expires. See, Baswell-Guthrie, 879 F.Supp 2d. at 1197 (holding that expert testimony not needed to establish that contract clause added to contract after its execution was obvious misconduct by a lawyer); Valentine v. Watters, 896 So.2d 385, 394 (Ala. 2004)(holding that failure to timely file an action is within the common knowledge of the average layperson). The Court has concluded that Land Ventures could not have confirmed a workable Chapter 11 Plan under any set of circumstances. In Part II(D)(3) infra, the Court shows why this is so. Given the futility of the act of filing a plan, it follows that Land Ventures' argument–that Fritz's failure to meet the standard of care is self-evident–falls of its own weight.

Land Ventures argues that Fritz misrepresented his experience and falsely represented that he could "deploy the armory" and "bring Farm Credit to its knees." (Doc. 40, p. 15). It argues that Fritz's misconduct was so obvious to a layman that expert testimony is not necessary. Land Ventures is incorrect on all counts. Fritz has years of experience as a staff lawyer in the Bankruptcy Administrator's office handling Chapter 11 cases. While his experience representing debtors was limited at the time he was retained by Land Ventures, it is not accurate to portray him as a "neophyte." The Bankruptcy Administrator oversees all Chapter 11 cases, conducts an intake meeting with the debtor's lawyer and representative, reviews all attorney fee applications, most all Chapter 11 motions and, most importantly, makes a recommendation to the Court as to whether a Chapter 11 Plan should be confirmed by the Court. A staff lawyer must be knowledgeable in all phases of Chapter 11 bankruptcy practice. That the bulk of Fritz's experience is as a staff lawyer for the Bankruptcy Administrator does not mean that he was not competent to represent Land Ventures here. The Court further rejects any per se characterization of a less experienced lawyer as one who is necessarily incompetent. Every lawyer must have his first case, as every surgeon must remove his first gall bladder. With adequate training, preparation and attention, a young lawyer can competently represent a debtor. Lack of experience in and of itself is not tantamount to malpractice, just as a lawyer with many years of experience is not necessarily immune to committing malpractice. Land Venture's contention that Fritz's malpractice is self-evident is without merit. As Land Ventures has failed to offer the testimony of a lawyer competent to testify to the standard of care in Alabama, it has failed to carry its burden on this issue.

2. Land Ventures offeres no admissible evidence that it has suffered damages

To prevail on a claim for attorney malpractice, the Plaintiff must prove that it suffered damages. A failure of proof on this issue is fatal to Land Venture's case. Rink v. Cheminova, 400 F.3d 1286, 1292 (11th Cir. 2005)(affirming a District Court decision where expert testimony–the sole evidence of damages–was excluded under Daubert, resulting in a failure of proof on an essential element and dismissal of the case). Here, Land Ventures seeks to prove damages solely through the expert testimony of Jerry Culver. Under the principles of Daubert, the trial court performs a gatekeeping function whereby it is required to exclude expert testimony which fails to mee a minimum threshold of reliability. Daubert, 509 U.S. 579; see also, United States v. Frazier, 387 F.3d at 1260 (11th Cir. 2004)(noting that "[t]he importance of Daubert's gatekeeping function cannot be overstated"). Reliability in the context of expert testimony is based primarily upon an assessment of the validity of the expert's reasoning or methodology and its application to the facts of this case. Daubert, 509 U.S. at 591-93. While Daubert envisioned this standard to be flexible, taking into account a number of factors, a general framework of admissibility follows that:

> [e]xpert testimony may be admitted into evidence if: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficient reliable as determined by the sort of inquired mandated in Daubert; and (3) the testimony assists the trier of fact, throught the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548, 562-63 (11th Cir. 1998)(citations omitted). The party submitting the expert testimony bears the burden of satisfying each of these elements by a preponderance of the evidence. Rink, 400 F.3d 1t 292. In exercising this gatekeeping function, judges may act sua sponte to prohibit testimony that fails to meet this Daubert standard. Loeffel Steel Products, Inc., 387 F.Supp. 2d at 800 (N.D. Ill. 2005)(citing O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1094 (7th Cir. 1994)).

This Court finds that Jerry Culver's expert testimony, Land Ventures' sole evidence of damages, is inadmissible under the principles of Daubert and Rule 702, Federal Rules of Evidence. A review of Culver's opinions show them to be unreliable due to both an improper methodology, and because Culver is not qualified to testify competently on these matters. Culver offers four opinions, which are considered in order.

Culver's first opinion is as follows:

> Opinion #1
>
> At the conclusion of the bankruptcy procedures, Land Ventures for 2, LLC lost real estate with a stated value of $3,005,000 and a net value of $1,559,000. It also lost yearly rental income of approximately $128,000, five year rental income of $639,801 and ten year rental income of $1,279,60. The total years loss was $3,123,960, the five year loss would have been $3,661,801, and a ten year loss would have been $4,284,602.

(Doc. 18). This opinion is seriously flawed in almost every respect. First, Culver begins with a "stated" value of $3,005,000 for the real property, which is nothing more than Todd Pittman's self-serving statement as to what he thinks the property is worth. Culver's report does not show that he did anything to verify these values. For this reason alone, the opinion is invalid. Moreover, the Bankruptcy Court rejected Pittman's values for the Luverne and Holmes County

properties when it granted Farm Credit's motion for relief from the automatic stay. (10-30651, Doc. 106). Therefore, Culver's opinion is invalid for a second reason, that it is contradicted by findings of fact made by the Bankruptcy Court, after an evidentiary hearing.

Culver's Opinion No. 1 is flawed for a third reason. He posits that Land Ventures lost yearly rental income of $128,000, and then extends that figure forward for both a five and ten-year period. Culver does not explain how he arrived at this $128,000 figure. Culver attaches copies of Land Venture's monthly operating reports to his expert report, he makes no effort to reconcile his $128,000 annual rental figure to the amounts actually earned by Land Ventures, which was considerably less. See, Part I(B), and fn. 7, supra. Land Ventures was not renting its property for enough to pay its operating expenses and pay its debt service, yet Culver wishes away this troubling fact with a bare, unsupported assumption.

Culver compounds his error regarding the rental income in two ways. This erroneous figure is extended both five and ten years out in the future, making no effort to discount it to present value. He compounds his error again when he adds the five and ten year figures, which are flawed in multiple ways, by adding to it the $3,005,000 figure, which is discussed in detail above. One way of valuing property is to discount its future rental net income to present value. Culver necessarily double counts when he adds the properties' future rental value to its current market value. Thus, Culver errs in multiple ways in arriving at the rental and fair market values of the property and compounds these errors when he adds the two together.

Culver's Opinion No. 1 is flawed in yet another way in that he makes no provision for the value received by Pittman–Land Ventures' shareholder–upon the estate's liquidation. The measure of damages in an attorney malpractice case is the difference between the amount

actually realized by the clietn and the amount the client would have realized had the alleged malpractice not occurred. Laddin v. Powell Goldstein LLP (In re Verilink Corp.), 457 B.R. 832, 839 (N.D. Ala. 2011). Pittman was paid $151,280.86 as a result of the liquidation of the Land Ventures bankruptcy estate and Farm Credit was paid $340,511.19 on its unsecured claims.[15] The payment to Farm Credit was benefit to Pittman because he was personally liable as a guarantor of the debt. The total of the amount paid to Pittman, for his equity interest in Land Ventures, and the payment to Farm Credit, which resulted in a dollar for dollar benefit to Pittman, is $491,792.05–none of which was acknowledged by Culver in his report. In other words, Culver assumed–without saying so–that the liquidation of Land Ventures resulted in a total loss to Pittman.

Culver's remaining opinions, which will not be quoted verbatim, may be dealt with briefly. Culver's Opinion No. 2 is to the effect that Land Ventures could have satisfied Farm Credit had the transaction with Gregory Scott been completed. Specifically, Culver assumes that Scott would have purchased a one-half interest in the Luverne and Holmes County properties for

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[15] Technically speaking, Pittman was paid on his unsecured claim and not as an equity holder, however, in this case that is a distinction without a difference. Except for Pittman, all of the unsecured claims were either disallowed or paid as something other than an unsecured claim. Pittman filed Claim No. 8 on July 14, 2011, in the amount of $25,000, contending that he was due money for unpaid wages. The Trustee objected to that claim. (10-30651, Doc. 369). Through negotiations, Pittman's priority claim was disallowed, however, he was given an allowed unsecured claim for $1,269,150. (10-30651, Docs. 369, 377). Because there were no other unsecured claim, it was not necessary to subordinate Pittman's claim to those of other creditors, which is what would have happened had there been other allowed unsecured claims. For more detail on the interplay of the claims of Todd Pittman and Farm Credit, see the Trustee's Final Report and the Trustee's Distribution Report. (10-30651, Docs. 433, 451). For the rules governing distribution of property of the estate, refer to 11 U.S.C. § 726. All of this is to say that however couched, the distribution made to Pittman and to Farm Credit to the benefit of Pittman was made by virtue of the fact that Pittman was the stockholder in Farm Credit and not because the Bankruptcy Court believed Pittman actually held a valid unsecured claim.

$650,000. As will be discussed in Part II(D)(3), infra, that was not going to happen. As Opinion No. 2 is dependent upon a transaction which would not have been done, the opinion is invalid. Culver's Opinion No. 3 is a rehash of Opinions Nos. 1 and 2, and is invalid for the same reasons. Culver's Opinion No. 4 is simply a rehash of Opinion No. 3, and is invalid for the same reason.

The Court rejects Land Venture's proffer of Culver's expert opinion because, as stated above, the methodology he used is so lacking in reliability that it fails to meet the standard set out by the Supreme Court in Daubert for the admission of expert opinions. In addition, the Court notes that on the face of Culver's report, he is not qualified by experience of education to render the opinions proffered. Culver graduated from Auburn with a Bachelor's Degree in Accounting and Economics in 1966, and he worked as a Special Agent for the Internal Revenue Service from 1972 to 2000. (Doc. 18, pp. 12-16). Since leaving the Internal Revenue Service he has worked as a criminal investigator. Service as a criminal investigator for the IRS no doubt requires skill and training, however, nothing in Culver's banckground shows that he is competent to render an opinion as to the value of real property or to undertake an analysis as to the value of a hypothetical loss of a going concern real estate business. Indeed, being a perfectly competent criminal investigator does not make him more qualified than the average layman where real estate and its valuation are concerned. In addition, the fact that Culver has no certifications raises questions as to his qualifications. Culver's report is replete with opinions as to the values of certain pieces of property, yet nothing in his resume demonstrates that these are opinions which he is qualified to render.

Applying the principles of Daubert and Rule 702 of the Federal Rules of Evidence, the factual assumptions underlying Culver's opinions are invalid and his methodology is seriously

flawed. Examination of Culver's resume shows that he has not relevant certifications or experience. For these reaons, Culver's expert testimony, and his opinions therein, are rejected in their entirely. As Culver's report was Land Ventures' sole evidence on its claim for damages, they are left with no supporting evidence and as a result, its claim fails.

3. Land Venture's evidence of causation fails because it is dependent upon a claim that an investor would have come forward which is not feasible

The unsoluble problem with the Land Ventures bankruptcy case was that it could not generate enough income to pay its operating expenses and the indebtedness owed to creditors. It was this lack of income rather than anything Fritz did, or did not do, which resulted in the conversion of the Land Ventures Chapter 11 bankruptcy case to a case under Chapter 7, which ended in a liquidation of its assets. While Land Ventures never filed a Plan, inferring from its actions, and the representations of its counsel, its plan was to sit on the Luverne property–its crown jewel–and sell it, perhaps to Walmart, for enough to pay the creditors and make a handsome profit for Pittman, its shareholder. The Court rejected that plan at the time it converted Land Venture's case from a case under Chapter 7 to a case under Chapter 11.

The hypothetical plan proposed by Land Ventures in response to Fritz's motion for summary judgment is the same as the plan rejected by the Bankruptcy Court, with just two significant differences. Land Ventures contends that Greg Scott, through his company 2HV (Two Hillbillies and a Vet) would have paid $650,000 for a one-half interest in the Luverne and Holmes County properties, with a stipulation that the property had to be free and clear–which it

was not. Second, Land Ventures contends that it could have sold the Rutledge, Alabama property to Stephens Construction for $202,500. (Doc. 40, Ex. D).

It is clear that without the sale to Scott, there could have been no feasible plan of reorganization which could have been made by Land Ventures.[16] As set out in Roger Spain's analysis, and as is clear to the Court from Land Ventures' monthly operating reports, Land Ventures had a negative cash flow. (Doc. 20). Without cash flow sufficient to pay all operating expenses as well as to satisfy the Farm Credit indebtedness, there was no way to confirm a workable Chapter 11 Plan.[17] Therefore, whether Land Ventures can establish the causation element of its case turns on the validity of the two sales described above.

The hypothetical sale to Greg Scott for $650,000 is invalid because at no time did Scott ever obligate himself to buy for that amount. The following is an excerpt from Scott's deposition.

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[16] Land Ventures could have attempted a plan of liquidation, which would have left Pittman in control of Land Ventures to sell the property. Brett Weiss, Land Ventures expert, alludes to such a possibility in his deposition. To have confirmed such a plan, Pittman would have had to convince his creditors and the Bankruptcy Court that everyone would be better off with Pittman in control of the liquidation than a Chapter 7 trustee. In this case, that would have been a tall order. A plan of liquidation may have been a viable middle ground between reorganization and liquidation in a Chapter 7. As Land Ventures has not argued that in its filings with the Court, it will proceed under the assumption that the alternatives are liquidation in a Chapter 7 and a plan of reorganization consistent with the proposed plan submitted by Land Ventures. (Doc. 40, Exhibit D).

[17] The holder of a secured claim, such as Farm Credit, is entitled to–among other things–deferred cash payments with a present value equal to the amount of its claim. 11 U.S.C. § 1129(b)(2)(A).

Q: Did you make a proposal to Todd [Pittman] about what you were willing to pay to buy into these properties? [referring to Luverne and Holmes County].

A. We did.

Q: Do you recall what that proposal was?

A: We proposed 650,000 for half interest in the property, 50 percent interest, as I recall. I believe that's what it was.

Q: And did that have any condition on that 650? Did it include any requirements that the property be free of other mortgages or anything like that?

A. I believe so, yes.

* * *

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Q: And is it fair to say that you and your partner, either individually or through whatever your business may have been, never entered into any type of contractual arrangement for Land Ventures for 2 or Mr. Pittman to buy these interests in these two properties?

A. In other words, did we sign a contract for it?

Q. Correct.

A. No.

Q. Was any contract ever drafted up, to your knowledge?

A. Not to my knowledge.

Q. Now, did you actually make a firm commitment to Mr. Pittman to buy these two properties?

A. We did, verbal.

(Doc. 40, Scott Deposition, pp. 14, 38-39).

It goes without saying that an oral offer to buy real estate is not binding. Ala. Code § 8-9-2. Real estate professionals such as Pittman and Scott certainly understood that. The Bankruptcy Court would not have confirmed a Chapter 11 Plan predicated on an oral and nonbiding offer to purchase. Scott could have walked away from the deal any time he wanted, thereby leaving no way for Land Ventures to honor its commitments under its hypothetical Chapter 11 plan. If Scott truly wanted to purchase a one-half interest in the Luverne and Holmes County property, as he claims in his deposition, there are two ways it could have been done. First, he could have made a written offer and the Bankruptcy Court could have approved it pursuant to 11 U.S.C. § 363. Second, Scott could have made a binding and written offer, with all of the contingencies cleared in advance, and that could have been incorporated into a Chapter 11 Plan.

The contention that Scott would have paid $650,000 for a one-half interest in property which the Bankruptcy Court found was worth only $771,000, is specious. Scott was asked about the discrepancy between what he claimed he would pay, and what the property actually sold for in his deposition.

> Q. Would you be surprised to know that Luverne property was ultimately sold for $300,000 by the bank after listing it for almost two years?
>
> A. No, it's not. Because I understand – I think I know who bought it.
>
> Q. Who bought it?
>
> A. I'm guessing. I've heard that –
>
> Q. Who do you think bought it?

A. I thought – I think Bill Carr bought it.

(Doc. 40, Scott Deposition, pp. 74-75). To accept the assertion that Greg Scott would have bought a one-half interest in the Luverne and Holmes County properties for $650,000, when both properties together were found to be worth $771,000, and they were ultimately sold for only $500,000 one would have to suspend all of one's powers of reason. Moreover, had Scott believed that the a one-half interest in the two properties was worth $650,000, suggesting that the entire interest in the two was worth at least $1,300,000, he has no explanation as to why he did not later buy the properties for $500,000.

The Court is aware that this civil action is before it on cross motions for summary judgment and by the rules that it must accept at face value even patently false testimony. Yet this evidence shows not only that Scott is not credible, but it explains why he was unwilling to put his offer in writing. The Bankruptcy Court would not have been willing to allow Pittman and Scott to "play" the Court as a Chapter 11 Plan predicated on a nonbinding offer would have done. One can imagine the kind of mischief such a Plan would have unleashed. Scott would not have been obligated to buy yet Farm Credit would have been bound to wait for its money indefinitely.

Collier Espy, Fritz's expert witness testified regard the proposed plan as follows:

> Q. And so with respect to the concerns you have about this Chapter – this Exhibit 12 that you're looking at right now, you're not stating that that's not a feasible plan if you can sell the properties in a reasonable time at a reasonable price. You're just questioning whether that could have occurred?
>
> A. Right. I think that the plan should have dates by which there would be sales. I mean, this is like – I don't mean to be flippant – the rule against perpetuities. It can't just go on.

(Doc. 31, pp. 98)(Espy Deposition). By that Espy meant that the Bankruptcy Court would not have allowed Pittman and Scott to keep Land Ventures' creditors at bay indefinitely. Assuming that at some date in the future Pittman ultimately came up with a buyer for Luverne, Scott could then honor his oral promise to buy a one-half interest and take his share of the profit. From his point of view, it would have been a no lose situation. Scott would have received one-half of the profit of the sale, with no downside risk. Had no buyer ever been found, he would have been free to walk away. Under Land Venture's hypothetical plan, the risk would have been all on Farm Credit, and the rewards if a purchaser was found, would have gone to Pittman and Scott. Such a plan would not be confirmable as it is not feasible. To put the matter differently, an oral promise to purchase an interest in land at some unspecified date in the future is not an appropriate basis upon which a Chapter 11 Plan can be confirmed.

The hypothetical plan advanced by Land Ventures here is not feasible and would not have been confirmed Bankruptcy Court. Greg Scott never made a written offer to purchase and therefore was not bound. Land Ventures' hypothetical plan depends on the sale–which was not going to happen. Scott was not legally bound and it would have been illogical for him to pay $650,000 for a one-half interest in property which was worth, at most $771,000. As Scott had not bound himself, the Bankruptcy Court would not have confirmed a plan predicated on a sale which was not supported by a binding offer. From this, one may conclude that regardless of whatever else may have been done, Land Ventures was going to end up being liquidated in a Chapter 7 bankruptcy proceeding. Nothing that Fritz did, or did not do, could have changed this. For this reason, Land Ventures' attorney malpractice claim against Fritz fails because there is no

way they can prove that anything he did was the proximate cause of any damages they may have suffered.

III. CONCLUSION

Plaintiff Land Ventures has failed to prove three significant elements of its attorney malpractice claim against Fritz. First, Land Ventures fails to establish that Fritz violated the standard of care of a bankruptcy lawyer in Alabama because it has offered no admissible evidence of the standard of care. Land Venture's proffered expert, Brett Weiss, is a Maryland lawyer who is not qualified to testify as to the standard of care with respect to an Alabama lawyer practicing bankruptcy law. The Court rejects Land Venture's argument that the standard is nationwide. Second, Land Ventures has offered no admissible evidence concerning damages. The report of its damages expert, Jerry Culver, is so flawed as to its methodologies, assumptions and conclusions that under the Daubert doctrine, the Court will not admit his testimony–leaving Land Ventures without any proof of damages. Third, Land Ventures has failed to establish that any purported breach of the standard of care resulted in any damages, purported or otherwise. Land Ventures proof of causation, indeed much of its proof as to the entire case, rests on the assumption that Greg Scott would have purchased a one-half interest in the Luverne and Holmes County properties. As that assumption is unfounded, proof of the causal link necessarily fails, resulting in a failure of proof as to the essential element of proximate cause. For these reasons, it

is recommended that the District Court grant Fritz's motion for summary judgment, deny Land Venture's motion for summary judgment and dismiss this civil action with prejudice.

July 18, 2014.

William R. Sawyer
Chief U.S. Bankruptcy Judge